

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GENARO SANGUINO,

Petitioner,

v.

HIDALGO,

Respondent.

Civil 08-0376 W (CAB)
No.

**ORDER DISMISSING PETITION
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

In accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States.

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim

1 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
2 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
3 United States.” See 28 U.S.C. § 2254(a).

4 Here, Petitioner states only “L.S.S. & Min’s transcripts” in his first ground for relief.
5 (Pet. at 42.) In his second ground for relief, Petitioner refers the Court to the attached petition
6 for writ of habeas corpus which was previously filed in the Central District of California. (Id.
7 at 43.) However, the referenced Petition has only a crossed out claim, which appears to be the
8 same as Petitioner raised in Ground One. (Pet. at 6.) In no way does Petitioner claim he is “in
9 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
10 § 2254.

11 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

12 Further, habeas petitioners who wish to challenge either their state court conviction or the
13 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
14 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
15 remedies, a California state prisoner must present the California Supreme Court with a fair
16 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
17 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
18 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
19 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
20 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
21 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
22 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
23 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
24 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
25 in federal court, but in state court.” Id. at 366 (emphasis added).

26 Nowhere on the Petition does Petitioner allege that he raised his claims in the California
27 Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so
28 specify. “The burden of proving that a claim has been exhausted lies with the petitioner.”

1 Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997); see Breard v. Pruett, 134 F.3d 615, 619
 2 (4th Cir. 1998); Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997); Oyler v. Allenbrand,
 3 23 F.3d 292, 300 (10th Cir. 1994); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).

4 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 5 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 6 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
 7 period shall run from the latest of:

8 (A) the date on which the judgment became final by the
 9 conclusion of direct review or the expiration of the time for seeking
 such review;

10 (B) the date on which the impediment to filing an application
 11 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

12 (C) the date on which the constitutional right asserted was
 13 initially recognized by the Supreme Court, if the right has been
 14 newly recognized by the Supreme Court and made retroactively
 applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or
 16 claims presented could have been discovered through the exercise
 of due diligence.

17 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West Supp. 2002).

18 The statute of limitations does not run while a properly filed state habeas corpus petition
 19 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
 20 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 21 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 22 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 23 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 24 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

25 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 26 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to
 27 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.
 28

1 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal
2 habeas relief because he has not alleged exhaustion of state court remedies.

3 **FAILURE TO NAME PROPER RESPONDENT**

4 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On
5 federal habeas, a state prisoner must name the state officer having custody of him as the
6 respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28
7 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to
8 name a proper respondent. See id.

9 The warden is the typical respondent. However, “the rules following section 2254 do not
10 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
11 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
12 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
13 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
14 be the state officer who has official custody of the petitioner (for example, the warden of the
15 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

16 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
17 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
18 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
19 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
20 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
21 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
22 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
23 at 895.

24 Here, Petitioner has incorrectly named “The People of the State of California/Hidalgo,”
25 as Respondent. In order for this Court to entertain the Petition filed in this action, Petitioner
26 must name the warden in charge of the state correctional facility in which Petitioner is presently
27 confined or the Director of the California Department of Corrections. Brittingham v. United
28 States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

FAILURE TO USE PROPER FORM

1
2 Additionally, a Petition for Writ of Habeas Corpus must be submitted in accordance with
3 the Local Rules of the United States District Court for the Southern District of California. See
4 Rule 2(c), 28 U.S.C. foll. § 2254. In order to comply with the Local Rules, the petition must be
5 submitted upon a court-approved form and in accordance with the instructions approved by the
6 Court. Presently, Petitioner has submitted an application for writ of habeas corpus on a non-
7 approved form. The correct forms are available free of charge from the clerk of the court and
8 available upon request.

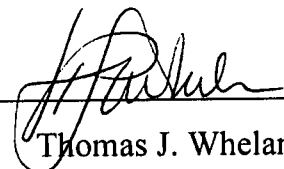
CONCLUSION AND ORDER

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10 In light of the above, the Court **DISMISSES** the case without prejudice for Petitioner's
11 failure to (1) state a cognizable federal claim, (2) allege exhaustion of state judicial remedies,
12 (3) name a proper respondent, and (3) use a court-approved form. To have this case reopened,
13 Petitioner must file a First Amended Petition which remedies the pleading deficiencies noted in
14 this Order, along with a copy of this Order no later than May 2, 2008.

15 **The Clerk of the Court is directed to send Petitioner a blank Southern District of**
16 **California First Amended Petition form for Petitioner's convenience.**

17 **IT IS SO ORDERED.**

18 DATED: 3/8/08



Thomas J. Whelan

United States District Judge